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No. 83-1168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

and

ASSOCIATION OF FLIGHT ATTENDANTS,
Petitioners,

v.

WESTERN AIR LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The question presented for review by the Court is more appropriately stated as follows:

Whether an employer's grooming and appearance standards for its public contact employees, evenhandedly applied to and equally maintainable by employees of both sexes, violate Title VII of the Civil Rights Act of 1964 merely because they are not identical for males and females.

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Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*	*passim*

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Western Air Lines, Inc. ("Western"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the affirmance by the United States Court of Appeals for the Ninth Circuit of the judgment of the United States District Court for the Northern District of California dismissing Petitioners' complaint.

STATEMENT OF THE CASE

In this class action brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), Petitioners, the Air Line Pilots Association, International and the Association of Flight Attendants, contend that the maximum weight requirements of Western's grooming and appearance standards sexually discriminate against female flight attendants.

Western has maintained a weight control program as part of its grooming and appearance standards since at least 1963. (CR "72," ¶ 4)[1] Prior to June 1972, Western employed only women as flight attendants. Thereafter, Western's weight control program applied to flight attendants of both sexes. (CR "72," ¶ 4) Western's weight standards were fair and equally maintainable by male and female flight attendants. (Tr. 246-259) Although Western's hiring standards were such that only one in twenty applicants was offered a position, approximately 82 percent of the female applicants and approximately 83 percent of the male applicants satisfied the hiring weight standard. (Tr. 898-900)[2] Western also enforced the weight standards in an evenhanded and non-discriminatory manner. Weight checks were administered in the same manner for both sexes. (Tr. 253) Both sexes had the same difficulty in meeting the weight standard, (Tr. 252) and approximately the same percentage of male and female flight attendants was suspended and terminated for exceeding the weight limits.

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[1] The citations to those parts of the record relied upon in the Statement of the Case are as follows: "Tr." refers to the Reporter's Transcript of the trial. "CR '72' " refers to the "Agreed Pre-Trial Order" as numerically indexed on the district court's docket sheet. The numbers following these citations refer to the page(s) or paragraph of the cited document which provide support for the immediately preceding proposition.

[2] Western's maximum hiring weights were four pounds lighter than its maximum post-hiring weights for flight attendants. (*Id.*)

(Tr. 894) Petitioners offered no evidence that a single male attendant exceeding the maximum weight standard had not been disciplined in accordance with Western's normal policy.

Following trial on the merits, the district court issued findings of fact and conclusions of law exonerating Western of any Title VII violation with respect to its weight policy. The Court of Appeals for the Ninth Circuit, having recently ruled in *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982) (en banc), *cert. dismissed*, —— U.S. ——, 103 S. Ct. 1534 (1983), that Continental's weight policy violated Title VII because it applied only to female flight attendants, affirmed the district court's decision. The court ruled that Western's policy was the sort of grooming standard, permitted by Title VII, which was evenhandedly applied to both sexes and which did not deprive either sex of employment opportunities. Petitioners' requests for rehearing and *en banc* consideration were rejected.

For purposes of their petition to this Court, Petitioners necessarily concede that Western's other grooming and appearance standards are lawful and that Western's weight standards are fair and do not have an adverse impact on female flight attendants as a group.

SUMMARY OF THE ARGUMENT

Title VII was enacted to insure equal employment opportunities for all persons. It was not intended to force employers to adopt ambisextrous grooming and appearance standards for its employees. All circuit courts which have addressed the issue have properly held that an employer's grooming and appearance standards for its male and female employees, which are evenly applied and which do not deprive either sex of employment opportunities, do not violate Title VII simply because they are not identical. No decisions of this Court are in conflict with or suggest a need to review the principles well established by the circuit court decisions.

REASONS FOR DENYING THE PETITION

I. The Ninth Circuit's Decision Conforms With The Decisions Of All Circuit Courts Which Have Addressed Grooming And Appearance Standards

Petitioners argue that Title VII prohibits an employer from maintaining any form of grooming and appearance regulation that is not based on a unisex standard. The Court of Appeals for the Ninth Circuit rejected that argument, as has every other circuit court which has addressed an employee's Title VII challenge to his or her employer's grooming standards. The circuit courts are in agreement that where grooming and appearance standards do not deprive the members of either sex of employment opportunities and are evenhandedly applied to employees of both sexes, they are beyond the reach of Title VII.[3] *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 605-606 (9th Cir. 1982) (en banc), *cert. dismissed*, —— U.S. ——, 103 S. Ct. 1534 (1983) (approving evenhandedly applied grooming standards including weight control policy); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755-756 (9th Cir. 1977) (tie requirement for men); *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977) (hair length for men); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 457 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978) (weight standard for flight attendants); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685 (2d Cir. 1976) (hair length for men); *Knott v. Missouri Pacific Railroad Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (hair length for

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[3] Such cases are distinguishable from those decisions where the employer applies special appearance rules to only one sex that are unduly burdensome. *E.g., Carroll v. Talman Federal Savings & Loan Association of Chicago*, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980) (only female employees required to wear uniforms); *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763, 790 (D.D.C. 1973), *modified on other grounds*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978) (forbidding only female flight attendants to wear glasses).

men); *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (hair length for men); *Baker v. California Land Title Co.*, 507 F.2d 895, 896-898 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975) (hair length for men); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973) (hair length for men); *Jarrell v. Eastern Air Lines, Inc.*, 430 F. Supp. 884, 891-893 (E.D. Va. 1977), *aff'd per curiam*, 577 F.2d 869 (4th Cir. 1978) (weight standard for flight attendants); *Cox v. Delta Air Lines*, 14 FEP Cases 1767, 1768 (S.D. Fla. 1976), *aff'd without published opinion*, 553 F.2d 99 (5th Cir. 1977) (weight standard for flight attendants). *Accord EEOC v. Delta Air Lines, Inc.*, 441 F. Supp. 626 (S.D. Tex. 1977), *rev'd on other procedural grounds without published opinion*, 619 F.2d 81 (5th Cir. 1980) (weight standard for flight attendants). *See Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349, 1350-51 (4th Cir. 1976) (hair length for men); *Fagan v. National Cash Register*, 481 F.2d 1115, 1121-1125 (D.C. Cir. 1973) (hair length for men) applying same general rule to positions wherein only one sex was represented).

These decisions fully recognize that the purpose of Congress in enacting Title VII was to achieve equal employment opportunities for men and women and to eliminate those artificial, arbitrary and unnecessary barriers that favor certain employees over others. *Willingham*, 507 F.2d at 1091; *Baker*, 507 F.2d at 897. They also recognize Title VII's focus on the individual, as emphasized by the Fifth Circuit in *Willingham*. The court there said that "the Act should reach any device or policy of an employer which serves to deny acquisition and retention of a job or promotion in a job to an individual *because* the individual is either male or female." *Willingham*, 507 F.2d at 1091 (emphasis in original); *Baker*, 507 F.2d at 896. And yet all concur that Title VII was not intended to force employers to adopt ambisextrous grooming and appearance standards.

Title VII requires no more than equal treatment of the sexes. Where the decision of whether to comply with an employer's grooming standards rests with the individual employee, and the standards are otherwise evenhandedly applied and are not a pretext to exclude one sex, there simply is no basis for a finding of sex discrimination. This was clearly articulated in *Willingham*, where the court stated:

> Equal employment *opportunity* may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race[, sex,] and national origin. . . . Hair length is not immutable and in the situation of employer vis à vis employee enjoys no constitutional protection. If the employee objects to the grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job.

507 F.2d at 1091 (emphasis in original). Similarly, in *Baker*, the Ninth Circuit recognized that this Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), was "not talking in terms of hair styles or modes of dress over which the job applicant has complete control. The Court was addressing itself to characteristics which the applicant, otherwise qualified, had no power to alter." *Baker*, 507 F.2d at 897. *Accord Earwood*, 539 F.2d at 1351; *Dodge*, 488 F.2d at 1336-1337. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973) ("Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens . . . .").[4]

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[4] Even if Title VII were intended to foreclose employers from treating male and female employees differently based on theoretically mutable conditions related to such traditionally fundamental rights as pregnancy, marriage, or the right to rear a child, *see, e.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971)

The circuit courts have consistently held that an employer's grooming policies cannot violate Title VII where they are evenhandedly applied to both sexes and do not impede an employee's employment opportunities. As Petitioners concede the fairness of Western's policies and their lack of adverse impact, no substantial issues are presented for review by this Court.

II. This Court's Decisions In *Manhart* And *Norris* Are Inapplicable To This Case

Petitioners suggest that the principles consistently applied by the circuit courts conflict with this Court's decisions in *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, —— U.S. ——, 103 S. Ct. 3492 (1983). That is, Petitioners contend that because this Court has stated that "Title VII requires employers to treat their employees as *individuals*, not 'as simply components of a racial, religious, sexual or national class,'" *Norris*, 103 S. Ct. at 3498 (emphasis in original) (quoting *Manhart*, 435 U.S. at 708), Western's maximum weight standards must be identical for male and female flight attendants, even though men weigh more than women. Petitioners clearly misread *Manhart* and *Norris*.

In *Manhart* and *Norris* this Court barred an employer's use of sex based longevity tables to calculate pension fund premiums or benefits. The tables indicated that, on the average, women live longer than men and that women would theoretically receive more payments than men after retirement. The pension plan in *Man-*

(per curiam); *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). Title VII simply was not intended to intrude so far into an employer's workplace as to regulate the length of its employees' hair, their mode of dress or the girth of their waists, if the standards do not otherwise discriminate. *Laffey*, 567 F.2d at 457; *Knott*, 527 F.2d at 1252; *Willingham*, 507 F.2d at 1091.

hart exacted higher premiums from females than males, but paid equal benefits. The plan in *Norris* exacted equal premiums, but paid women a smaller monthly annuity.

This Court, based on Title VII's prohibition against treating individuals as components of a racial, religious, sexual, or national class, determined in *Manhart* that the employer discriminated against its female employees by deducting more from their paychecks than from the paychecks of their male counterparts, because there was "no assurance that any individual woman working for the Department will actually fit the generalization on which the Department's policy is based." 435 U.S. at 708. To the contrary, explained the Court, "[m]any of those individuals will not live as long as the average man. While they were working, those individuals received smaller paychecks because of their sex, but they will receive no compensating advantage when they retire." *Id. Accord Norris*, 103 S. Ct. at 3498-3499 (same conclusion where the discrimination involved smaller payouts after retirement).

The concern addressed in *Manhart* and *Norris* was that an individual woman might be discriminated against because she did "not share the characteristic that differentiates the average class representatives." *Manhart*, 435 U.S. at 708. There was no way to assure that any woman would be fairly treated, because there was no way to assure that the additional burden borne by any woman during employment would be compensated by greater benefits after employment. *Id.*

The concern addressed by this Court in *Manhart* and *Norris* is not present in this case. Every flight attendant, including each member of Petitioners' class, necessarily met the weight standards as of their date of hire. Unlike a person's age, life expectancy, height, or sex, a person's weight, like the length of one's hair or the clothes one wears, is a mutable characteristic reasonably controllable by most individuals. *Jarrell v. Eastern Air Lines, Inc.*, 430 F. Supp. 884, 892 (E.D. Va. 1977),

aff'd per curiam, 577 F.2d 869 (4th Cir. 1978). It is no more difficult for a woman to maintain a specific weight than it is for a man. (Tr. 246-259); *Jarrell*, 430 F. Supp. at 892; *Leonard v. National Airlines, Inc.*, 434 F. Supp. 269, 274 (S.D. Fla. 1977). Thus in this case, unlike in *Manhart* and *Norris*, every flight attendant, including each member of Petitioners' class, can conform with the standard and, furthermore, can determine at all times whether he or she is in conformity with that standard.

Conceding that the weight rule is fairly applied and without adverse impact, Petitioners' only argument is that the standards are discriminatory because they are not identical for male and female flight attendants. First, as applied to the class in this case, the standards are equal. All flight attendants must satisfy the standard to be hired. No individual member of the Petitioners' class is subjected to any greater burden or treated any differently than any male flight attendant because of that individual's sex.

Western does discriminate against individual male and female flight attendants who are overweight, but Title VII affords no protection against an employer's policy that discriminates on the basis of individual characteristics other than sex, race, religion, or national origin. *Manhart*, 435 U.S. at 715; *General Electric Co. v. Gilbert*, 429 U.S. 125, 138-140 (1976). Indeed, *Manhart* and *Norris* themselves note that pension funds might properly discriminate on the basis of other factors related to longevity, such as "smoking habits, alcohol consumption, weight, medical history, or family history." *Norris*, 103 S. Ct. at 3495; *Manhart*, 435 U.S. at 709-710.

Petitioners err in arguing that Western's policy does not satisfy the individual consideration requirement of *Manhart* and *Norris*. In those cases, every woman paid either higher premiums or received lower benefits solely because she was a woman and not because of an individual assessment of her life expectancy. Here, each

prospective flight attendant, including every member of Petitioners' class, is individually assessed at hiring to insure that he or she can and does meet Western's standards. Thereafter, each flight attendant is individually assessed against the standard he or she has already met. That a male or female flight attendant subsequently fails to satisfy the standard has nothing to do with his or her sex.

Petitioners ask this Court to preclude an employer from differentiating in any way between its male and female employees in establishing grooming and appearance standards. Where an employer's grooming and appearance standards are evenhandedly applied and equally maintainable by both sexes, courts should not become enmeshed in evaluating the details of those standards. If Petitioners' theory were adopted, courts would be required to determine whether an airline can lawfully preclude its male pilots from wearing long hair and earrings or its female pilots from wearing "punk" crewcut hairstyles. Every circuit court which has addressed grooming and appearance standards has held that Congress did not intend for courts to get involved with such issues under the guise of Title VII. *Manhart* and *Norris* are not inconsistent with those holdings.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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